BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

FILED
7-11-16
04:59 PM

Order Instituting Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Award of Intervenor Compensation.	Rulemaking 14-08-020 (Filed August 28, 2014)

REPLY COMMENTS OF GOODIN, MACBRIDE, SQUERI & DAY, LLP ON PROPOSED DECISION OF COMMISSIONER FLORIO

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Dated: July 11, 2016

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Pursuant to Rule 14.3(d) of the Commission's Rules of Practice and Procedure, Goodin, MacBride, Squeri & Day, LLP ("GMSD") respectfully replies to the comments of the Ratepayers of Lake Alpine Water Company ("RLAWC") on the Proposed Decision ("PD") of Commissioner Florio. The last day to file Opening Comments was July 5, 2016. Pursuant to Rule 14.3(d), replies are due five days later, July 11.2016[1] These comments are timely filed.

I. INTRODUCTION

RLAWC does not explain how the Commission may lawfully direct a party other than "a public utility" [2] to pay intervenor compensation. Such an order remains outside the ambit of Public Utilities Code Section 1807.

II. COMMENTS

GMSD's adherence to the view expressed in its earlier comments in this docket is supported by an important point raised by RLAWC: "a non-utility applicant is not converted to a utility unless and until the CPCN is granted"[3] GMSD agrees.

[1] July 10, 2016 falls on a Sunday.
[2] See, Public Utilities Code Section 1807. All statutory references herein are to the California Public Utilities Code unless otherwise indicated.
[3] RLAWC's Opening Comments, p. 4.

The premise that a non-utility applicant does not become a public utility unless and until its application is granted is hardly controversial, yet it leads RLAWC and GMSD to different legal conclusions.

For GMSD, the premise completes a three step analysis supporting the position GMSD has taken from the outset.

1. Section 1807 states that "(a)n award made under this article shall be paid by the public utility that is the subject of the hearing…"
2. In order to be "the public utility that is the subject of the hearing…" an entity must first be a "public utility".
3. As RLAWC points out, "a non-utility applicant is not converted to a [public] utility unless and until the CPCN is granted." [4]

Accordingly, "unless and until the CPCN is granted", the non-utility applicant may not be ordered to pay "(a)n award made under this article".[5]

RLAWC reaches a different conclusion. It notes that in D. 11-07-036 (*Nevada Hydro*) and D.13-11-018 (*Sacramento Natural Gas Storage*), the Commission directed unsuccessful CPCN applicants (not public utilities) to pay intervenor compensation. The Commission having done so in those two instances, RLAWC reasons the Commission should be able to impose payment obligations on entities even further distanced from the text of Section 1807, stating that no legal distinction exists between applying for a new CPCN and applying for "transfer" of an existing CPCN.[6]

In essence, while GMSD urges the Commission avoid the error[7] of *Nevada Hydro* and *Sacramento Natural Gas Storage*, RLAWC asks the Commission to compound it.

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[4] RLAWC's Opening Comments, p. 3..
[5] The "article" is comprised of Sections 1801-1807 of the Public Utilities Code.
[6] *Id.* An applicant truly seeking to "transfer" a CPCN would already be a public utility proceeding pursuant to Section 851. We believe RLAWC intended to refer to a non -utility applicant seeking to acquire control of or merge with a public utility pursuant to Section 854. Notwithstanding the fact that the term "transfer of control" is associated with Section 854, the phrase never appears in the statute nor, even, does the word "transfer. The regulated act is that of "acquiring" control.
[7] See discussion of *Nevada Hydro* and *Sacramento Natural Gas* in COMMENTS OF GOODIN, MACBRIDE, SQUERI & DAY, LLP ON PROPOSED RULE 17.5 at page 4.

In our earlier comments, we addressed *Nevada Hydro* and *Sacramento Natural Gas* and stated that "it is doubtful that either decision would have survived court review had either applicant sought the same; neither applicant, however, even sought rehearing." [8] We remain of that view and believe that *Southern California Gas Company*[9] , as recently applied in *New Cingular Wireless*[10], requires a level of adherence to the literal text of Section 1807 that is not found in either proposed Rule 17.5 or RLAWC's Opening Comments. *New Cingular Wireless* held that the "explicit, limited fee rules" found in Sections 1801-1807 are not subject to *Greyhound* [11]deference, stating that:

> Since we are dealing with a set of "explicit, limited fee rules" (*Southern California Gas, supra*, 38 Cal.3d at p. 68) enacted as part of a detailed statutory scheme defining the CPUC's jurisdiction in this area, applying the *Greyhound* test here would effectively swallow the statutory scheme in whole, rendering its limitations subordinate to the CPUC's interpretation of the statute.[12]

III. CONCLUSION

Rule 17.5 should not be adopted.

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[8] See discussion of *Nevada Hydro* and *Sacramento Natural Gas Storage* at p. 4 of the COMMENTS OF GOODIN, MACBRIDE, SQUERI & DAY, LLP ON PROPOSED RULE 17.5

[9] *Southern California Gas Company, Pacific Telephone & Telegraph Co. and PG&E v. Public Utilities Commission.*, 38 Cal. 3d 64, 68 (1985)

[10] *New Cingular Wireless PCS, LLC v. Public Utilities Commission* (*The Utility Reform Network et. al, Real Parties in Interest*) 246 Cal App. 4th 784;2016 Cal. App. LEXIS 298 (April 19, 2016.)

[11] *Greyhound Lines, Inc. v. Public Utilities Commission,* 68 Cal. 2d 406 (1968). *Greyhound* held that "there is a strong presumption of validity of the Commission's decisions and the Commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." *New Cingular Wireless* held that such deference was not appropriate where the Legislature adopted "explicit, limited fee rules"…enacted as part of a detailed statutory scheme defining the CPUC's jurisdiction…"

[12] *Id*. at p. 808

Respectfully submitted July 11, 2016 at San Francisco, California.

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